

PERKINScoie

700 13th Street, NW
Suite 600
Washington, DC 20005-3960

+1 202.654.6200
+1 202.654.6211
perkinscoie.com

RECEIVED
FEC MAIL CENTER

2015 JUN 26 PM 2: 08

VIA HAND DELIVERY

June 25, 2015

Jeff S. Jordan
c/o Kim Collins
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Graham M. Wilson
Daniel Nudelman
GWilson@perkinscoie.com
DNudelman@perkinscoie.com
D +1.202.434.1638
F +1.202.654.9154

Re: Response to Complaint, MUR 6937

Dear Mr. Jordan:

On behalf of Braley for Iowa (the "Committee"), and Theresa L. Kehoe in her official capacity as treasurer, this letter responds to the complaint received by the Commission on May 4, 2015 and filed as Matter Under Review 6937 (the "Complaint"). The Complaint fails to state a violation of the Federal Election Campaign Act, 52 U.S.C. § 30101 et seq. (the "Act"), and should be dismissed immediately.

BACKGROUND

The Committee developed a large email list of donors and supporters (the "List") over the course of the 2014 election cycle. After the election, NextGen Climate Action Committee ("NextGen") a federally-registered independent expenditure-only committee, made a request to purchase the rights to use the List on an unlimited, ongoing basis. After matching the List against NextGen's existing email list to remove duplicate subscribers, the Committee consulted with its list broker and digital consultant, Well and Lighthouse, to arrive at a fair market value of \$177,817.60 for the remaining 111,136 List subscribers, based on a blended rate of \$1.60 per subscriber. The market value was based on the cost of building the List, the distribution of subscribers in terms of past giving and activity history, and past revenue performance of the List—a methodology in line with standard industry practice. A memorandum from Well and Lighthouse describing the factors underlying this valuation is attached as *Exhibit A*.

The Committee and NextGen engaged in an arm's length negotiation regarding acquisition of the List, NextGen agreed to the purchase price, and an agreement was executed in February 2015. A copy of the agreement is attached as *Exhibit B*. Under the agreement, both parties represented and warranted that the fee paid by NextGen for the List represented its fair market value, and NextGen represented and warranted that it would use the List in a manner commensurate with its fair market value, in the ordinary course of its business, and within a reasonable period of time.¹

¹ See Exhibit B §§ 3.7, 3.8.

The Complaint alleges that the \$177,817.60 paid by NextGen to the Committee for acquisition of the List exceeded the List's fair market value but includes no facts or information of any kind to support this naked allegation.

ANALYSIS

"The Commission may find reason to believe only if a Complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Act]."² Additionally, "unwarranted legal conclusions from asserted facts" and mere speculation will not be accepted as true.³ The Complaint fails to provide any specific facts to support its allegation that NextGen paid more than the fair market value for the List, relying instead on an inapposite comparison and speculative assertions. It therefore fails to meet this standard and must be dismissed.

Under established FEC precedent, proceeds from the sale of a list of supporters by a federal committee will not be subject to the Act's contribution limits, and may come from sources that are prohibited from making contributions, as long as: (1) the list has been developed by the committee in the course of its political activities over a period of time and primarily for its own political or campaign purposes rather than for sale or lease to others; (2) the sale of the list constitutes only a small percentage of the committee's use of the list; (3) the list, or the sold portion thereof, has an ascertainable fair market value; and (4) the list is sold at that usual and normal charge in a bona fide, arm's length transaction and is used in a commercially reasonable manner consistent with such an arm's length agreement.⁴

The "usual and normal charge" is defined as the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate prevailing at the time the services were rendered.⁵ The FEC has "long recognized that a political committee's mailing lists are assets that have value and that are frequently sold, rented, or exchanged in a market,"⁶ and that "a broad and open market exists" for lists from which "a fair market value may usually be ascertained."⁷

Where the conditions above are satisfied, the Commission has held that payments received by a committee from the sale of a list will be considered to be federal funds usable by the committee for Federal election purposes and for any other purposes permitted under the Act and the

² See Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas, Matter Under Review 4960 (Clinton for U.S. Exploratory Committee) (Dec. 21, 2000) (emphasis added).

³ *Id.*

⁴ See Adv. Op. 2003-19 citing Adv. Op. 2002-14. See also Adv. Op. 1992-24, Adv. Op. 1990-26, Adv. Op. 1986-14, Adv. Op. 1989-04.

⁵ 11 C.F.R. § 100.52(d)(2).

⁶ See Adv. Op. 2014-06 citing Adv. Op. 2011-02 at 7-8; Adv. Op. 2002-14 at 4-5; Adv. Op. 1982-41 at 2; Adv. Op. 1981-46 at 2.

⁷ See Adv. Op. 2002-14 at 5.

1600443647430

Commission's regulations, regardless of whether the payment is from a federally permissible source.⁸

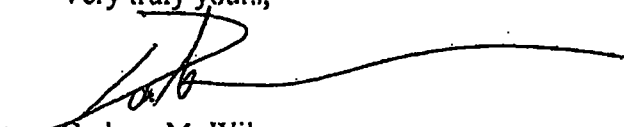
The Complaint presents no specific facts suggesting that NextGen paid more than the usual and normal charge for the List, or otherwise failed to satisfy any of the conditions described above. The Complaint's sole factual basis for its allegation is a reference to an agreement for a one-time use of an email list of an unspecified size for a lower price.⁹ But a one-time list rental does not provide a valid point of comparison for NextGen's outright purchase of the List, which gave NextGen the legal right to use the List without limitation.¹⁰ As in any other market, it's cheaper to rent than to buy. The comparison is also inapposite because it does not consider the specific make-up of the two lists. The Complaint provides no justification for questioning the price NextGen paid for the List here, which was the product of an arm's length negotiation, supported by the outside valuation of a list broker.

With no other factual support for the allegation, the Complaint argues that the circumstances surrounding the sale—specifically, NextGen's support of Congressman Braley during the 2014 election and the Committee's debt at the time of the sale—"indicate that the payment may have been in excess of the market value of the list."¹¹ But the subjective intent or motivations of the parties is irrelevant to the question of whether the price represented the usual and normal charge for the List. Further, a review of relevant Commission opinions and enforcement decisions demonstrates very clearly that political affinity between the parties to this type of agreement is the norm, which makes sense given that what is being purchased is, in essence, the opportunity to contact like-minded supporters. In any case, it certainly does not provide any grounds for a finding of a reason to believe.

CONCLUSION

The Complaint fails to allege specific facts that constitute a violation of the Act or Commission regulations. For the reasons described herein, we respectfully request that the Commission dismiss this matter and take no further action.

Very truly yours,


Graham M. Wilson
Daniel Nudelman
Counsel to Respondents

⁸ See *id.* Such payments would be reported in the category of "Other Receipts."

⁹ See Complaint at 3 *citing* Hillary Clinton, FEC Decision, MUR 6775 (Feb. 12, 2015).

¹⁰ See Exhibit B § 2.1.

¹¹ See Complaint at 3.